Minutes

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Tuesday, January 30, 2018
Location: 955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Acting Deputy General Counsel), Sheree Price (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member), Vera Abbott (OEA Board Member), P. Victoria Williams (OEA Board Member), Jelani Freeman (OEA Board Member), and Wynter Clarke (OEA Paralegal).

I. Call to Order – Sheree Price called the meeting to order at 11:03 a.m.

II. Ascertainment of Quorum – There was a quorum of Board members present for the office to conduct business.

III. Adoption of Agenda – Vera Abbott moved to adopt the Agenda. Patricia Hobson Wilson seconded the motion. The Agenda was adopted by the Board.

IV. Minutes from Previous Meeting – The December 19, 2017 meeting minutes were reviewed. There were no corrections. The minutes were accepted.

V. New Business

A. Public Comments on Petitions for Review

1. There were no public comments offered.

B. Summary of Cases

1. Willie Porter v. Department of Mental Health OEA Matter No. 1601-0046-12R15 (Motion for Reconsideration) – This matter was previously before the OEA Board. By way of background, Employee was a Psychiatric Nurse with Agency. On July 28, 2011, Agency issued a Notice of Final Decision to Employee informing him that he would be removed from his position. Employee was charged with any knowing or material misrepresentation on an employment application.

After initially upholding Agency's action, the AJ eventually held that new and material evidence provided by Employee supported his position that he resigned from his position and was not removed. Therefore, he ordered that Employee be reinstated with back pay and benefits.

On October 13, 2015, Employee submitted a "Request for Review or C[l]arification of the Initial Decision Benefits." In the petition, Employee contended that despite its assertions otherwise, Agency was aware of his previous employment status. Therefore, he requested that he be reinstated as a Grade 10, Step 10. Additionally, he sought back pay; interest; attorney's fees; removal of the action from her personnel file; and relief to cover his retirement, medical bills, and life insurance.

The OEA Board issued its Opinion and Order on Remand on March 7, 2017. It held that the Initial Decision addressed all of Employee's requests on Petition for Review, with the exception of attorney's fees. In addition, it explained that the benefit calculations were made by another District agency; thus, OEA could not make a specific ruling regarding his benefits. Moreover, the Board noted that the Superior

Court for the District of Columbia issued a decision on February 14, 2017, upholding OEA's ruling for Agency to reinstate Employee with back pay and benefits. Accordingly, it denied Employee's Petition for Review.

On March 24, 2017, Employee filed a Motion for Reconsideration. He states that he and his attorney were not properly served with the Opinion and Order. Employee provides that because his counsel is identified in Superior Court proceedings, OEA was aware that he was his representative and should have served him with the Opinion and Order. In addition, he states that the OEA Board did not provide notice that it *sua sponte* decided to treat his request for clarification as a Petition for Review. Employee also provides that the Board ignored that Employee should have been at a Grade 10, Step 10 by failing to consider the computation of back pay. Moreover, Employee argues that the Board failed to consider that he was the prevailing party in this matter. Accordingly, Employee requests that the Board vacate its order and remand the matter to the AJ to determine his full relief.

On November 3, 2017, Agency filed a response. Agency asserts that Employee was returned to work on May 30, 2017 and that any delay in processing back pay and benefits were the result of Employee's failure to submit any requisite paperwork. Moreover, Agency contends that Employee's counsel acknowledged at a September 15, 2017 status conference that Employee was reinstated at his proper level. Thus, it is Agency's position that there are no outstanding issues for which it needs to comply.

2. **Joanne Taylor-Cotten v. D.C. Public School System, OEA Matter No. 1601-0072-16 –**Employee worked as a School Counselor with Agency. On June 27, 2016, Agency issued a notice of termination to Employee. The notice provided that under IMPACT, Agency's assessment system for school-based personnel, an employee who received a final IMPACT rating that declines between two consecutive years from "Developing" to "Minimally Effective," was subject to separation. Employee was rated "Developing" for the 2014-2015 school year, and her final IMPACT rating for the 2015-2016 school year was "Minimally Effective." As a result, she was terminated effective August 5, 2016.

   Employee filed a Petition for Appeal with OEA on August 1, 2016. She argued that she was wrongfully terminated and discriminated against. Specifically, Employee alleged that she was not provided with a private office or telephone; she did not receive assignments; and she was not allowed to attend trainings. Moreover, she explained that she received excellent previous evaluation ratings and that ninety-five percent of her ninth grade students were promoted with above-average test scores. Accordingly, she requested that her termination be investigated and that she be reinstated to a permanent position.

   Agency filed its Answer to Employee's Petition for Appeal on September 1, 2016. It asserted that it properly followed the IMPACT process. Agency explained that Employee was terminated because of a "Developing" rating for the 2014-2015 school year and a "Minimally Effective" rating for the 2015-2016 school year. As for Employee's discrimination claims, Agency argued that OEA was not the proper forum to address these issues. Therefore, it is Agency's position that Employee was properly terminated under IMPACT.

   On April 7, 2017, the AJ issued his Initial Decision. He opined that OEA's jurisdiction over this matter is limited to Agency's adherence to the IMPACT *process*

it instituted at the beginning of the school year (emphasis added). The AJ found that Chapter 5-E of D.C. Municipal Regulation ("DCMR") §§1306.4, 1306.5 gave the superintendent of Agency the authority to set procedures for evaluating its employees. Further, he explained that while Employee maintained that her scores were unfair, she did not provide any evidence to support her claim that the IMPACT evaluation process had not been followed; nor did she specify that the Evaluator's comments were untrue. He asserted that Employee did not proffer any credible evidence that controverted any of the Evaluator's comments. Moreover, the AJ found that Employee's work performance was evaluated in accordance with the IMPACT rules. The AJ held that the Evaluator made two unsuccessful attempts to have a second conference with Employee. Accordingly, he provided that because Employee's final IMPACT score resulted in a "Developing" rating one year and a "Minimally Effective" rating the subsequent year, Employee was appropriately terminated from her position. As it related to Employee's complaints regarding her work conditions, the AJ ruled that the complaints were not relevant to her IMPACT evaluations, nor were they legal grounds for overturning Agency's action. Accordingly, he upheld Agency's termination action.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on April 20, 2017. She contends that Agency failed to adhere to the IMPACT process by not conducting a conference with the Evaluator. Employee argues that she was not provided with a telephone or private office. Additionally, she outlines all of the resources and tutoring opportunities that she provided to Agency. Therefore, she requests that she be reinstated; receive back pay and damages; have her last two evaluations rescinded; and provided attorney's fees.

Agency filed a Response to Employee's Petition for Review on May 19, 2017. It provides that Employee was properly evaluated. Agency explains that during both school years, Employee was either provided post-evaluation conferences or attempts were made to schedule them, as required by the IMPACT guidelines. As it relates to Employee's alleged work conditions, Agency provides that Employee was evaluated on her role as a Counselor. Accordingly, it states that its actions to terminate Employee are proper and requests that the OEA Board deny Employee's request to remand the matter to the AJ because there is no new material facts or erroneous application of law or fact presented in the appeal.

3. **Dwight Robbins v. D.C. Public Schools, OEA Matter No. 1601-0213-11R16–** This matter was previously before the OEA Board. By way of background, Employee worked as a teacher with Agency. At the close of the 2009-2010 school year, Employee was classified as an excessed teacher with an "Effective" rating under IMPACT, Agency's performance assessment system. As a result, he was given the choice to accept a buyout; take an early retirement; or take an additional year to secure a new placement. Employee selected to take an additional year to secure placement, but he was unable to obtain a position by mutual agreement for the 2011-2012 school year. On July 15, 2011, Agency notified Employee that he would be terminated effective August 12, 2011 because he failed to secure a new position.

   An Initial Decision was issued on June 16, 2014. The AJ held that Employee received notice from Agency advising him that he needed to secure a new teaching position by mutual consent on or before June 22, 2010. The AJ noted that Employee signed an Additional Year Selection Form ("AYSF") on December 27, 2010, but was unable to secure a new position before the proscribed deadline. He also concluded

that Agency correctly utilized the 2007-2012 CBA, and not the 2004-2007 CBA, to excess teachers. Consequently, Employee's termination was upheld.

Employee filed a Petition for Review with OEA's Board on July 21, 2014. He argued that the Initial Decision was based on an erroneous interpretation of statute because the AJ failed to evaluate Agency's actions under the correct CBA. Employee also opined that Agency violated the CBA because he was not provided a full year to secure a new position. Finally, Employee maintained that Agency misled him with regard to his retirement options, which left him with only six months to obtain a position. Therefore, Employee requested that the Board reinstate him to his positon with back pay and benefits.

The OEA Board issued an Opinion and Order on Petition for Review on February 16, 2016. It first noted that OEA was not jurisdictionally barred from considering an employee's claims that an adverse action violated the express terms of an applicable CBA. Next, the Board explained that the AJ failed to provide an analysis in support of his conclusion that the 2007-2012 CBA, and not the 2004-2012 CBA, should govern this appeal. It stated that analyzing Agency's actions under each CBA could possibly result in different conclusions. Because the Board was unable to conclude that the Initial Decision was based on substantial evidence, Employee's Petition for Review was granted and the matter was remanded to the AJ for further consideration.

An Initial Decision on Remand was issued on March 23, 2017. First, the AJ concluded that the excessing process began on June 11, 2010, when Agency first notified Employee that he was subject to removal. He noted that the 2004-2007 CBA had an intended duration of October 1, 2004 through September 30, 2007, as stated in Article XLIV of its terms. The AJ further provided that Agency and WTU subsequently entered into a new CBA in 2007. Under the new agreement, the expressed duration of the CBA was October 1, 2007 through September 30, 2012. In comparing the two CBAs, their corresponding duration clauses, and D.C. Council Resolution 18-530, the AJ determined that the 2007-2012 CBA should govern the instant appeal. Accordingly, the AJ held that Agency followed the correct excessing procedures because Employee was unable to secure employment at the end of the 2009-2010 school year. He further provided that Employee's other ancillary arguments constituted grievances over which OEA lacks jurisdiction. Therefore, Employee's termination was upheld.

Employee disagreed with the Initial Decision on Remand and filed a second Petition for Review on April 27, 2017. He claims that the AJ's conclusion regarding the retroactivity of the 2007-2012 CBA must be reversed because nothing within the language of the contract indicates that the parties intended the excessing provisions to be retroactive. Employee further reasons that Agency violated the terms of the 2004-2007 CBA because it failed to follow the correct execessing procedures. Lastly, he argues that even if the AJ was correct in concluding that the 2007-2012 CBA should govern this appeal, the Initial Decision on Remand failed to properly analyze whether Agency complied with the procedures for excessing teachers under the new agreement. Therefore, Employee asks this Board to grant his Petition for Review and reverse the Initial Decision on Remand.

Agency filed a Response to Employee's Petition for Review on June 1, 2017. It argues that the AJ correctly concluded that the 2007-2012 CBA controlled Employee's excessing process. Agency further restates its claim that OEA lacks jurisdiction over this appeal because Employee filed a grievance prior to filing an

appeal with this Office. Consequently, it requests that the Board uphold the Initial Decision on Remand and dismiss Employee's Petition for Review.

4. **John Barbusin v. Department of General Services, OEA Matter No. 1601-0077-15–**Employee worked as a Supervisory Special Police Officer with Agency. On March 20, 2014, Agency served Employee with an Advance Written Notice of Proposed Suspension based on charges of "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty" and "any knowing or negligent material misrepresentation on other document given to a government agency: intentional false statement." Agency's adverse action proposed a suspension of thirty days for the neglect of duty charge and fifteen days for the misrepresentation charge. Both charges stemmed from a December 28, 2014 incident wherein Employee responded to a 10-33 call (Officer Needs Assistance) that was outside of Agency's jurisdiction and legal authority. While responding, Employee was involved in a single-person car accident on F Street in Northwest, D.C. On April 27, 2015, the Director of the Protective Services Division, Anthony Fortune, sustained Employee's proposed suspension. Employee began serving his suspension on May 3, 2015.

   Agency argued that the suspension was justified because Employee failed to follow directives which limited his jurisdictional authority to District of Columbia owned or operated properties. Agency stated that Employee responded to a call for service without being dispatched and that Employee carelessly and recklessly drove his patrol vehicle, resulting in the vehicle being totaled. Thus, it requested that his Petition for Appeal be dismissed.

   In response, Employee argued that Agency failed to provide any evidence to show that he deliberately attempted to minimize the speed of his vehicle in the incident report after the December 28, 2014 car accident. He further stated that the GPS installed in the vehicle was uncalibrated at the time and could not be relied on as an accurate measure of speed. Next, Employee opined that the neglect of duty charge could not be sustained. He reasoned that he should not have been punished because of the lack of formal training and confusion surrounding the jurisdictional limits of SPOs. Moreover, Employee stated that Agency imposed a double penalty because his driving privileges were suspended for several months prior to being suspended for the same underlying incident. Regarding the "self-dispatching" allegation, Employee claimed that this was a new charge that was unsupported by the facts. Accordingly, he believed that a thirty-day suspension was harsh, arbitrary, and capricious. In addition, he stated that the *Douglas* factors were not properly considered. Consequently, he requested that the suspension be overturned, or in the alternative, that the AJ conduct an evidentiary hearing.

   The AJ issued an Initial Decision on March 1, 2017. First, the AJ provided that Agency based its neglect of duty charge on three separate specifications: responding to a call for service outside of Agency's jurisdiction; self-dispatching to a call for service; and recklessly operating an Agency vehicle, resulting in a car accident. With respect to Agency's contention that Employee responded to a call for service outside of its operating jurisdiction, the AJ stated that Chapter 6A, Sections 1100 and 1101 of the D.C. Municipal Regulations ("DCMR") limits a SPO's ability to respond to certain District of Columbia owned or leased locations while on duty. However, he noted that the Office of the Inspector General's report regarding the lack of clear guidance on jurisdictional limits, in addition to the statements made by Agency's own management officials during depositions relevant to this appeal, undermined the

only written directive that was in place for 10-33 calls at the time Employee was suspended. After analyzing the evidence, the AJ concluded that Agency failed to meet its burden of proof in establishing that Employee neglected his duty when he responded to the 10-33 call on December 28, 2014.

Regarding Agency's argument that Employee responded to a call without specifically being dispatched, the AJ reiterated that SPOs were given contradicting directives in both the General Orders ("GO") and from the verbal orders given by the former Agency Chiefs, Lou Cannon and Rodney Parks. Specifically, he stated that employees during the relevant time period were told that if another officer required help, "[n]obody is going to investigate you or discipline you for helping another officer in that situation" and to "go to it." Accordingly, the AJ reasoned that Employee did not self-dispatch when he responded to the 10-33 call. Thus, he determined that Agency failed to meet its burden of proof with respect to this specification.

Relating to Employee's alleged failure to observe safety precautions, the AJ held that the guidelines provided in GO 301.6 clearly state that police vehicles must be operated with the purpose of preserving operator and citizen safety. According to the AJ, Employee violated the GO when he responded to the 10-33 call. In support of his finding, the AJ cited to the Motor Accident Report Form that was issued after Employee's accident. The report noted that the weather was clear and the traffic conditions were light at the time Employee's vehicle ran off the road. However, the primary cause of the accident was determined to be "driver inattention." Therefore, the AJ stated that Employee neglected his duty by failing to observe safety precautions and concluded that Agency met its burden of proof for this specification.

Next, the AJ held that Agency could not prove that Employee made an intentional false statement on his Incident Report regarding the speed at which he was traveling at the time of the accident. While the GPS installed on Employee's vehicle reflected that he was travelling at 51.57 miles per hour, the AJ acknowledged that the device was not calibrated. The AJ also noted that Agency's Proposing Official, Heath Scott, recognized during his deposition that the false statement charge was probably unwarranted. Consequently, the AJ opined that Agency failed to meet its burden of proof for this charge.

Lastly, citing to the holding in *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995), the AJ concluded that Employee failed to make a prima facie claim of disparate treatment. Ultimately, the AJ concluded that a thirty-day suspension was appropriate for a first time charge of neglect of duty because Agency proved that Employee failed to observe safety precautions at the time of his accident. As a result, Employee's suspension was upheld.

Employee disagreed and filed a Petition for Review with OEA's Board on March 1, 2017. He argues that the Initial Decision is not based on substantial evidence because AJ erred in concluding that he failed to observe safety precautions at the time of the accident. Employee maintains that he was not negligent in operating his vehicle and that he behaved in a reasonably prudent manner under the circumstances. He also explains that Agency punished him twice for the same underlying conduct. Further, Employee disputes the AJ's finding that that he failed to provide a prima facie showing of disparate treatment because at least one similarly situated officer was not punished under the same set of circumstances. Consequently, he asserts that the

penalty imposed was erroneous and that the Initial Decision should be overturned. In the alternative, Employee requests that the matter be remanded to the AJ for the purpose of holding an evidentiary hearing to elicit witness testimony relevant to the accident and his disparate treatment argument.

In response, Agency states that there is substantial evidence in the record to support the neglect of duty charge because Employee drove recklessly at a high rate of speed while responding to a call for service. According to Agency, crashing over a curb at a high speed, when there is no mechanical problem or interceding impact, falls below the standard of care expected of an operator of an emergency vehicle. Moreover, it argues that the AJ correctly concluded that there was insufficient evidence in the record to prove disparate treatment and that Employee did not suffer double employment jeopardy. Therefore, Agency submits that the thirty-day suspension was appropriate and asks that this Board uphold the Initial Decision.

C. Deliberations - After the summaries were provided, Patricia Hobson Wilson moved that the meeting be closed for deliberations. P. Victoria Williams seconded the motion. All Board members voted in favor of closing the meeting. Sheree Price stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

E. Final Votes –Sheree Price provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Willie Porter v. Department of Mental Health

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Sheree Price				X
Vera Abbott				X
Patricia Hobson Wilson				X
P. Victoria Williams				X
Jelani Freeman				X

Five Board Members voted in favor of dismissing Employee's Motion for Reconsideration. Therefore, the motion was dismissed.

2. Joanne Taylor-Cotten v. D.C. Public Schools

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Sheree Price		X		
Vera Abbott		X		
Patricia Hobson Wilson		X		
P. Victoria Williams		X		
Jelani Freeman		X		

Five Board Members voted in favor of denying Employee's Petition for Review. Therefore, the petition was denied.

3. Dwight Robbins v. D.C. Public Schools

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Sheree Price				X
Vera Abbott				X
Patricia Hobson Wilson				X
P. Victoria Williams				X
Jelani Freeman				X

Five Board Members voted in favor of dismissing Employee's Petition for Review. Therefore, the petition was dismissed.

4. John Barbusin v. Department of General Services

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Sheree Price			X	
Vera Abbott			X	
Patricia Hobson Wilson			X	
P. Victoria Williams			X	
Jelani Freeman			X	

Five Board Members voted in favor of remanding Employee's Petition for Review. Therefore, the petition was remanded.

F. Public Comments – There were no public comments offered.

VI. Adjournment – P. Victoria Williams moved that the meeting be adjourned; Jelani Freeman seconded the motion. All members voted affirmatively to adjourn the meeting. Sheree Price adjourned the meeting at 11:59 a.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist